

Section 2.2

How To Determine the Elements of the Violation

Questions posted at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- What is an element of a violation?
 - How do we figure out the elements of the violation?
 - Is there a simple method for figuring out the elements of the violation?
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Terms for the elements analysis

- **Elements** are the pieces (or components) which must be addressed to prove parts of the violation. The number of rows on a Worksheet does not necessarily equal the number of “elements” of a violation.
- **Evidence** is a fact of consequence that furnishes proof of the violation.
- **Facts** are statements that can be proven. For example, facts can be proven by credible documentation, testimony, photographs, etc.
- **Inference** is a conclusion, based upon reasoning. By engaging in reasoning, a fact or conclusion becomes more or less likely to have occurred. Make inferences only when you have sufficient facts. Inferences should always be noted or labeled as such.

Not all elements have inferences or require strategies!

How to analyze a violation – in a nutshell

- Select a law, regulation, or rule;
 - Break it into its relevant elements (components);
 - Provide a piece of evidence to prove each element;
 - Determine whether or not a violation occurred.
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Element variations are possible

Analyzing the elements of a violation is not an exact science. In some cases, there may be more than one perspective on how to analyze a specific requirement, resulting in a slight variation on the number of elements.

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How To Determine the Elements of the Violation, Continued

Elements analysis helps prove the violation and the case

This elementary analysis of the requirement (or violation) and its specific elements will help you to determine what evidence may be necessary for a Hearing Officer to make necessary findings of fact.

The Hearing Officer needs at least one piece of evidence for each element to make a finding of fact that the Respondent “violated” or failed to comply with the legal requirement.

The elements analysis exercise also helps Advocates to plan or outline their presentation to the Hearing Officer, because it helps to focus on the relevant matters and evidence necessary to prove a violation by a preponderance of the evidence.

Having trouble?

If you are having trouble determining the elements, it may be because you have encountered an “unwritten element,” clarifying statement, or a list within an element. Answering the following who, what, when, where, why and how questions may help you to determine the elements:

- **Who** is required to perform or complete the requirement?
 - This may be an “unwritten” element.
- **Who** is the requirement designed to protect?
 - This may be an “unwritten” element.
- **What** is the general requirement?
 - Occasionally, this is not stated and it may be unclear; try looking at the title of the law or regulation for guidance.
- **What** has to be done to fulfill the requirement?
 - Is there a specific method to be followed?
- **What**, if any, are the exceptions to the requirement?
- **When** or **where** is the requirement to occur?
- **Why** is this requirement important?
 - A specific “why” is sometimes not stated or apparent. Usually, the answer is something to the effect, “for the purpose of protecting the public health, safety, and the environment.”
- **How** is the requirement to be completed?

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How To Determine the Elements of the Violation, Continued

Example of a clarifying statement

Clarifying statements are not necessarily “elements” that would tend to prove or disprove a fact. They are usually just introductions or clarifying language to assist the reader to understand the Legislature or Director’s intent for creating the particular requirement.

Example: *“Notwithstanding that substantial drift would be prevented”*

This statement could be restated to say, “In spite of what we mentioned a moment ago about the likelihood that harm or damage might occur, in order to prevent “substantial drift,” you also have to”

Example of a broad element

Occasionally, elements are so broad they may seem subjective or may use subjective language. This is usually intentional on the part of the Legislature or Director because it isn’t always possible to anticipate every problem that could arise in the future. The language is intended to make the requirement robust enough so that it can apply to a variety of unanticipated situations.

For example: *“The applicator shall evaluate”*

Occasionally there will be a list following “evaluate” or other subjective words. Look for clues within the list (e.g., “and”, “or”). Occasionally, the list has no clues, but the list might not stand on its own – that is when it might be considered part of another element. Sometimes, there isn’t a list accompanying a broad element – in those cases, consider utilizing the testimony of an expert witness to offer an opinion, based upon their knowledge and experience.

Elemental wisdom

- Make sure you consider all of the elements of the violation. If a table has three legs and it needs four to stand up, then you need to attach four legs to the table.
 - Consider how an objective “trier of fact” might view the elements. You need to consider the elements during the investigation if you want your case to be successful when it is considered by an objective third party.
 - Is your “evidence” relevant to the elements of the violation? Seven matching binders of a perfectly-tabbed, thick investigation report probably won’t convince a “trier of fact” to make findings and a decision in your favor, if you miss addressing all elements of the violation(s).
 - Use your best judgment.
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How To Determine the Elements of the Violation, Continued

Purpose of the worksheets

The Elements of the Violation Worksheet is intended to:

1. Provide an elementary analysis of a legal requirement; and
2. Outline the elements necessary to prove the violation by a preponderance of the evidence.

These are guides to assist you in proving a violation.

Caveat

The worksheet is not intended to override common sense or specific legal advice. They may not provide examples of every type of evidence that may be available and they may not ask every question that might be relevant to prove a violation.

Worksheet

The worksheet is available in the following section.
